Supreme Court, U.S.
FILED

99538 SEP 27 1999

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No. 99-___

IN THE

Supreme Court of the United States

October Term, 1999

Elmer F. Bock,

Petitioner,

v.

St. Louis Southwestern Railway Co.,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 27, 1999

37 pp

QUESTION PRESENTED

Whether the court of appeals erred in concluding that Petitioner's state law tort claims arising from an accident at a rail crossing are pre-empted due to federal funding for the warning devices at the crossing.

PARTIES TO THE PROCEEDINGS

All the parties to the proceedings are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Elmer F. Bock respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion and orders granting Respondent summary judgment and dismissing Petitioner's complaint (App. 7-14) are unreported. The court of appeals' opinion affirming per Judge Hansen (App. 1-6) is reported at 181 F.3d 920.

JURISDICTION

The court of appeals entered its judgment on June 30, 1999. Petitioner invokes this Court's jurisdiction under 28 USC 1254(1).

STATUTORY PROVISION AND REGULATION INVOLVED

The statute (49 USC 20106) and regulation (23 CFR 646.214) involved in this case are reprinted in the appendix (App. 15-17).

STATEMENT OF THE CASE

This Petition presents a companion case to No. 99-312, *Norfolk Southern Railway Co.* v. *Shanklin* (filed Aug. 20, 1999, and brief in opposition filed September 17, 1999) (hereinafter "*Shanklin*"). Both cases address the circumstances in which federal funding for railroad crossing warning devices pre-empts state law tort claims alleging the inadequacy of those devices. The Eighth Circuit in this case adopted the *per se* rule urged by the railroad in *Shanklin* that pre-emption applies whenever "federal funds have been expended for warning devices at a [grade] crossing." Pet. App. 3. By contrast, Petitioner would have prevailed under

the Sixth Circuit's holding in *Shanklin* that pre-emption applies only if the federal government both funds the warning devices and also "actually determine[s]" that the devices at the particular crossing are "adequate" (Pet. for Cert., *Shanklin* 13a). The Sixth and Eighth Circuits' decisions epitomize a wider six-to-two conflict among the federal courts of appeals and state supreme courts (*see generally id.* 13-16), which this Court should grant certiorari to resolve.

1. This Court's Decision in *CSX Transportation* v. *Easterwood*.

The conflict in the lower courts arises from a disagreement over the meaning of dictum in this Court's decision in *CSX Transportation* v. *Easterwood* (507 US 658 (1993)) (hereinafter "*Easterwood*"). The plaintiff in *Easterwood* alleged that CSX Corporation negligently had failed to maintain adequate warning devices at a railroad crossing, resulting in a fatal accident. Agreeing with the court of appeals, this Court unanimously concluded that federal statutes and implementing regulations promulgated by the Federal Highway Administration (hereinafter "FHWA") did not pre-empt the plaintiff's state law tort claims. 507 US at 663-73; *id.* at 676 (Thomas, J., concurring).

The Court began by emphasizing that assertions of pre-emption are disfavored. As a general matter, "[i]n the interest of avoiding unintended encroachment on the authority of the States * * * a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus pre-emption will not lie unless it is *clear and manifest* purpose of Congress." 507 US at 663-64 (emphasis added) (citation and quotation marks omitted). This general reluctance to find pre-emption is, moreover, heightened in the context of railroad safety because the pre-emption provision of the Federal Railroad Safety Act of 1970 (49 USC 20106, *reprinted at* 15a) "displays considerable

solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665.

Applying "the relatively stringent standard set by the language of [49 USC 20106] and the presumption against preemption" (507 US at 668), this Court rejected the railroad's three asserted bases for pre-emption. First, pre-emption does not arise from federal regulations requiring states to prioritize improvements to crossings and to file yearly reports with the FHWA (*see* 23 CFR pt. 924), which this Court explained merely "encourage the States to rationalize their decisionmaking" and have "little to say about the subject matter of negligence law, because, with respect to grade crossing safety, the responsibilities of railroads and the State are, and traditionally have been, quite distinct." 507 US at 667-68.

Second, pre-emption does not arise from "regulations governing the use of particular warning devices," including particularly the requirement that all railroad crossing projects "employ devices that conform to standards set out in FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or Manual)." *Id.* at 666 (citing 23 CFR 646.214(b)(1), 655.603). The Manual, the Court explained, "provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety" and furthermore "undermines rather than supports [the railroad's] claim by acknowledging that the States must approve the installation of any protective device even as the railroads maintain 'joint responsibility' for traffic safety at crossings." 507 US at 669.

Third, on the facts before the Court, pre-emption did not arise from a federal regulation that (i) defines "adequate warning devices" for a "project" in which federal funds "participate in the installation of the devices" and (ii) provides that in certain circumstances "the type of warning device to be installed * * * is subject to the approval of the

FHWA." 23 CFR 646.214(b)(3), (b)(4), *reprinted at* 16a-17a. (For crossings that are not part of federally funded highway construction – such as the crossings in this case and *Shanklin* – the regulation sets out only a definition of adequacy, not an affirmative requirement that crossing devices be "adequate."). For the crossing at issue in *Easterwood*, the federal government apparently had considered and approved the installation of gates and had provided the necessary funds, but those funds had been diverted to another crossing. Accordingly, the Court concluded that federal funds had not "'participated in the installation of the [warning] devices'" on the "project," rendering the regulation inapplicable. *Id.* at 672 (quoting 23 CFR 646.214(b)(3)) (alteration in original).

In reaching this conclusion, the Court rejected the railroad's broad construction of the regulation. The railroad, noting that federal funds had been used to install gates on four related crossings, argued that all the crossings were all part of a single "project" for purposes of the regulation. The Court, however, left open whether "the term could be construed to include either individual or multiple crossing[s]," explaining that the single crossing at issue in that case had been treated as a separate "project." 507 US at 672-73; *cf. id.* at 672 (suggesting that a "project" for purposes of the regulation was "'a grade crossing'" (quoting 23 CFR 646.210(c)(3))).

The Court also rejected the railroad's argument that federal pre-emption was triggered because the regulation on its face required the FHWA to approve the warning devices at the crossing and thus "federal funds could not have been approved for this project unless the warning devices were deemed 'adequate,' which they were determined to be" (Reply Br. for Resp., *Easterwood* 20). Instead, the Court rested its holding on the fact that, notwithstanding what the regulation arguably could be read to require, the record showed that the FHWA had not *in fact* approved the warning devices in place at the time of the accident. 507 US at 672-73.

In holding that the plaintiff's state law claim was *not* pre-empted, the Court stated in dictum that when the federal regulation is "applicable, state tort law is pre-empted." 507 US at 670. The Court reasoned that, under the regulation, "*a project* for the improvement of *a grade crossing* must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] device.'" *Id.* (quoting 23 CFR 646.214(b)(3)) (emphasis added). Thus, pre-emption is triggered "for projects in which federal funds participate in the installation of warning devices," because "the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." 507 US at 671.

2. History of the Main Street Crossing.

This Petition arises from an accident at a railroad crossing on Main Street in Roe, Arkansas, which at the time of the accident was protected by a standard reflectorized crossbuck on each side of the track. The history of the crossbuck installation is well documented in the record. Responding to an amendment to the MUTCD requiring that all crossbucks be reflectorized, the State of Arkansas in 1978 elected to use federal funds to provide "the minimum protection required" at railroad crossings throughout the state. Specifically, the State would arrange for the installation of reflectorized "crossbuck signs" at each crossing as required by the MUTCD. C.A. Rec. 102 (Highway Department Order); *see also Easterwood*, 507 US at 662-63 (discussing statutory history of federal funding); 23 USC 130 note (Act of Aug. 13, 1973, tit. II, as amended); *supra* at 3 (discussing *Easterwood*'s analysis of MUTCD). The State then entered into agreements with several railroads, including Respondent, to arrange for the installation of the crossbucks to provide "the minimum protection of railroad-highway crossings." C.A. Rec. 104 (agreement between State and Respondent).

Pursuant to this agreement, Respondent compiled a list of the 273 crossings on its tracks in Arkansas. C.A. Rec. 64-68. The State then requested federal funding to provide two reflectorized crossbucks at each crossing. *Id.* 107. The FHWA, in turn, approved the request as to all 273 crossings, without requesting or receiving any further information, in a four sentence letter. *Id.* 108. Federal funds paid for ninety percent of the costs of installation, which was completed in 1980. *Id.* 112.

In determining to provide two crossbucks at each crossing, neither Respondent, nor the State of Arkansas, nor the FHWA made any individualized assessment of the safety needs of the individual crossings. As the state official responsible for crossing safety explained by affidavit in this case:

> While expenditures of the funds in question were approved by the Federal Highway Administration, as is normal with expenditures of any federal highway funds, this did not involve, in connection with this project, a review of what additional warning devices, if any, would be required to provide *adequate* warning at any of the subject crossings. The project's purpose was to bring all crossings * * * into compliance with the *minimum* requirements of the MUTCD as it relates to crossbuck installation.

C.A. Rec. 98-99 (emphasis added). In point of fact, the only information provided by Respondent regarding the Main Street crossing – which was crossing number 117 on Respondent's list of 273 – was the following line item set towards the bottom of the third page:

NO.	COUNTY	ID NO.	Mile Post NO.	LOCA-TION	ID. PLATE	CROSS-BUCK	POST	TRACKS (NO. OF) NO. SIGN (TRACKS)
• • • •								
117	MONROE	787 575W	TCT 213.70	(ROE)	1	1	1	1 (2)
• • • •								

C.A. Rec. 65.

The Main Street crossing includes multiple tracks, some of which are frequently are occupied by trains that can obscure the approach of another train. When the FHWA considers the "adequacy" of the warning devices at such a crossing, it requires the installation of flashing lights and lowering gates unless a "diagnostic team" makes a site-specific contrary determination and the FHWA agees. *See* 23 CFR 646.214(b)(3)(ii). No such determination of "adequacy" was made at the time crossbucks were installed at the Main Street crossing.

In fact, was not until October 1988 that any individualized assessment was made regarding what warning devices would be "adequate" at the Main Street crossing. The assessment, which was undertaken after one person was killed and two others were injured in separate accidents at the crossing determined that the crossbucks were *not* adequate and that flashing lights and gates were required. C.A. Rec. 86, 119-20.

Notwithstanding this determination, in the three-and-one-half years between the diagnostic assessment of the Main Street crossing and the March 1992 accident at issue in this case, the railroad did not ensure that lights and gates were installed. As alleged in Petitioner's complaint, Respondent "was negligent in failing to work with due diligence to have lights promptly installed at the crossing in question once it was determined that the crossing in question was abnormally dangerous and could not be used with reasonable safety by the traveling public without special warnings." *Id.* 613.

3. The Allegations of the Complaint and the Proceedings Below.

As Petitioner alleged in the complaint, Petitioner's daughter was killed at the Main Street crossing on March 10, 1992, just days before the lights and gates finally were to become active, when a train owned and operated by Respondent collided with her car. Visibility at the crossing

was seriously obscured by a line of trees and a work train that Respondent frequently left parked on a side track. Because the train that struck the car was traveling in excess of fifty miles per hour, it would not have been visible until the car already was within the crossing. Alleging that Respondent was culpable for the accident, Petitioner subsequently brought this suit in the United States District Court for the Eastern District of Arkansas.

Petitioner's complaint alleges, *inter alia*, that Respondent failed to exercise ordinary care in providing warnings at the Main Street crossing and that Respondent was negligent in failing to install lights and gates promptly at the crossing once it was determined that they were required. C.A. Rec. 615-17. The district court, however, dismissed the complaint on the ground that federal funding for the crossbucks at the crossing pre-empted any state law negligence claim regarding the safety of the crossing. Quoting Eighth Circuit precedent, which in turn relied on the dictum noted above from *Easterwood*, the district court held that "[f]ederal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators." Pet. App. 8 (quoting *Elrod* v. *Burlington Northern R. R.. Co.*, 68 F.3d 241, 243-44 (1995)). This was true, the district court reasoned, notwithstanding Petitioner's alternative theory that a determination of inadequacy was made after the crossbucks were installed. Quoting Tenth Circuit precedent, the district court explained that "the issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands under" federal regulations. Pet. App. 8 (quoting *Armijo* v. *Atchinson, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (CA10 1996)).

Petitioner appealed, urging the Eighth Circuit to adopt the Seventh Circuit's narrow view of federal pre-emption. Pet'r

C.A. Br. 14-15. In *Shots* v. *CSX Transportation*, the Seventh Circuit explained that

> [t]he regulation does not specify particular safety devices at particular crossings. Rather, it establishes criteria for determining which safety devices are required at particular crossings. Because the Supreme Court in *Easterwood* found that federal funds had not participated in the project at issue in that case, it had no occasion to consider the application of the regulation to particular crossings.

38 F.3d 304, 307 (1994) (per Posner, J.). Instead, according to the Seventh Circuit's reading of *Easterwood*, pre-emption applies only when the federal government both funds a crossing device and also determines that the warning device is adequate. *Id.* at 309. Respondent in its brief urged the Eighth Circuit to reject the holding of *Shots* in light of settled circuit predecent. Resp. C.A. Br. 10-11.

The Eighth Circuit agreed with Respondent and affirmed. "Since *Easterwood*, our court has been quite clear that if federal funds have been expended for warning devices at a grade crossing, state law tort claims alleging negligence in the maintenance of the crossing are preempted." Pet. App. 3 (citing *Bryan* v. *Norfolk & Western Ry. Co.*, 154 F.3d 899, 901 (1998), *cert. dismissed*, 119 S. Ct. 921 (1999); *Elrod*, *supra*). No different rule applied, the court of appeals concluded, even though a subsequent determination of inadequacy had been made regarding the Main Street crossing:

> [O]nce preemption occurs, it is not suspended or terminated by a subsequent governmental determination regarding the adequacy of the crossing. When, as here, a plaintiff brings a state tort cause of action for harm sustained at a railroad crossing that has federally funded, installed, and operational warning devices, that state

cause of action is preempted. That another, improved warning system was later planned is simply irrelevant.

Pet. App. 5.

This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted because the lower courts are substantially divided on this important and recurring question of federal law and because the decision below and the rulings of several other circuits misapply this Court's decision in *Easterwood.*

1. Certiorari Should Be Granted To Resolve The Conflict In The Circuits Over The Pre-emptive Effect Of Federal Funding for Crossing Warning Devices.

The Petition for a Writ of Certiorari in *Shanklin* (at 13-16) describes the six-to-two conflict in the circuits and state supreme courts over whether federal funding for crossing devices is sufficient to preempt state law tort claims alleging that the devices are inadequate. In particular, the Sixth Circuit in *Shanklin* expressly adopted the Seventh Circuit's decision in *Shots* (*see* Pet. for Cert., *Shanklin* 15a ("For the reasons that follow, we agree with the Seventh Circuit.")) while the Fifth, Eighth, Tenth and Eleventh Circuits, as well as the Iowa and Arkansas Supreme Courts disagree (*see id.* 13-14).

Certiorari is warranted, moreover, because the conflict in the circuits is embedded, as the lower courts have considered and adhered to their conflicting positions, sometimes in several cases. In this case, for example, the Eighth Circuit relied on two of its prior decisions holding that federal funding *per se* pre-empts state law claims, despite Petitioner's urging that the court should follow the Seventh Circuit's decision in *Shots*. *See supra* at 9. The Eleventh Circuit similarly has "decline[d] to adopt the Seventh Circuit's approach," and the Tenth Circuit expressly has "join[ed] the

Fifth and Eighth Circuits in declining to follow that decision." *Ingram* v. *CSX Transp.*, 146 F.3d 858, 865 (CA11 1998); *Armijo*, *supra*, 87 F.3d at 1191. By contrast, the Sixth Circuit in *Shanklin* considered the competing positions in detail, chose *Shots*, and denied rehearing *en banc* without a single judge requesting a vote. Pet. for Cert., *Shanklin* 9a-15a, 38a. For its part, the Seventh Circuit itself has continued to adhere to *Shots*. *Thiele* v. *Norfolk & Southern Ry. Co.*, 68 F.3d 179 (1995).

This conflict also merits this Court's attention because it is not fact bound but instead presents a question of law that is dispositive of many cases. This is not an instance in which the courts of appeals have adopted competing balancing tests that can be reconciled through further percolation or that are not outcome determiniative. In a majority of jurisdictions, railroads are *per se* entitled to dismissal of state law tort claims alleging the inadequacy of warning devices that were funded in whole or in part by the federal government. By contrast, in the Sixth and Seventh Circuits, which have jurisdiction over states in the nation's heartland with substantial railroad systems, railroads *per se* cannot invoke pre-emption except in the rare instance the federal government specifically determined that the warning devices at a particular crossing were adequate. Because no federal determination of adequacy was made regarding the Main Street crossing, there is no question that Petitioner would have prevailed under the test of the Sixth and Seventh Circuits. Certiorari is warranted in order to determine which of the two competing standards for finding federal pre-emption is correct.

2. The Decision Below Is Erroneous.

Certiorari furthermore is warranted because the decision below misapplies this Court's decision in *Easterwood*. The Eighth Circuit's holding rests on dictum in *Easterwood* that when a federal regulation defining "adequate warning

devices" on a "project" is "applicable, state tort law is pre-empted." Pre-emption applies, the Court explained, because "for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." 507 US at 671.

The Eighth Circuit failed to recognize that these statements in *Easterwood* carefully are limited to instances in which it is reasonable to infer that the FHWA has considered conditions at a particular crossing and determined that the proposed warning devices are adequate. This Court took care to note that it was treating a single crossing, not five related crossings, as the relevant "project." 507 US at 672-73. The Court also explained that pre-emption applies to circumstances in which "*a project* for the improvement of *a grade crossing* must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] device.'" *Id.* at 671 (quoting 23 CFR 646.214(b)(3) (emphasis added)). The railroad in *Easterwood* unsuccessfully argued, in fact, that federal funding standing alone necessarily implies that the federal government has determined that the crossing devices are adequate. In other words, *Easterwood* provides that when the FHWA issues funds for a single crossing, it is reasonable to infer that the agency has determined that the proposed warning devices are adequate for the conditions at that particular crossing.

The cases giving rise to the conflict in the circuits, by contrast, involve federal funding for the *en masse* installation of warning devices across entire states. The Main Street crossing, for example, was one of 273 simultaneously funded crossings on Respondent's rail system in Arkansas. The crossing at issue in *Shanklin* was one of 196 that were funded together. Pet. for Cert., *Shanklin* 8-9. For such massive projects, it is not plausible to infer that the federal government made any determination that the proposed

protections at individual crossings were adequate. Such an inference is not realistic and furthermore conflicts with this Court's admonition that assertions of pre-emption are disfavored, particularly with respect to railroad safety, given that the pre-emption provision of the Federal Railroad Safety Act of 1970 "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Easterwood*, 507 US at 665.

In any event, it is not necessary to resort to inferences because the uncontested record evidence in this case is that neither the railroad, nor the State of Arkansas, nor the federal government believed that the project was intended to provide "adequate" warning devices either as a whole or at any particular crossing. Both the State's order directing that the project be undertaken and the State's signed agreement with Respondent state expressly that the crossbucks were intended to provide "minimum" protection. C.A. Rec. 102, 104. When Respondent provided a list of all its crossings, it did not include any information regarding the conditions at the individual crossings. No further information was required from Respondent because, as the head of the relevant state agency explained in this case, the State did not intend for the crossbucks to provide "adequate" protection. *Id.* 98-99.

The record thus demonstrates that the federal government *couldn't* have determined that the crossbucks were adequate for the Main Street crossing. The FHWA did not know anything about the crossing other than a single line item that identified the mile marker at which the crossing was located and the number of tracks. *See supra* at 6. For example, the federal government knew nothing about the number of trains that cross the intersection, their speed, the volume of traffic, or surrounding obstructions such as buildings, trees, and other trains. This point is illustrated by the fact that the federal government funded the installation of the identical safety devices – two reflectorized crossbucks – at all 273 crossings

on Respondent's list without regard to the particular conditions at *any* crossing. If the federal government had addressed the question of what safety devices were "adequate" for the Main Street crossing, it plainly would have required the installation of lights and gates, as its regulations require, and as the FHWA in fact did require once a diagnostic survey was conducted in 1988.

The Eighth Circuit's view of pre-emption furthermore conflicts with the understanding of the very federal agency that administers the regulations in question. In the course of preparing this Petition, Petitioner solicited the FHWA's views regarding whether the Eighth Circuit was correct to hold that federal funding for crossing devices *per se* pre-empts state law tort claims. In response, the FHWA provided Petitioner with a brief the federal government filed as *amicus curiae* in another case presenting the same question, which Petitioner has lodged with this Court. As that brief explains, the United States believes that pre-emption applies only when the federal government has made an actual determination that the particular warning devices in question are adequate:

> Practical policy considerations buttress the conclusion that there must be express federal approval of the adequacy of a crossing warning device to occasion federal preemption. A crossbuck constitutes the minimum warning device required by law at any crossing. Under federal law, every railroad crossing must have a crossbuck sign. *See* 23 U.S.C. § 130(d). *See also* MUTCD at 8B-2. * * *
>
> In *Easterwood*, the Supreme Court held that the MUTCD itself did not displace state negligence law and thus did not have preemptive effect on what mechanisms were adequate devices under state tort law. *See* 113 S.Ct. at 1740. Given that holding, it would be anomalous if the mere participation of federal funding in installing this minimal warning device was sufficient to constitute a substantive determination by the federal

> government that this device is an adequate warning device at a particular crossing. The establishment of such a minimum standard does not by itself demonstrate an intent by Congress to preempt state law.

Br. of United States of America As *Amicus Curiae*, *Pearson* v. *Columbus & Greenville Ry. Co.*, No. 93-CA-01265 COA (Mo. Ct. App.) 19. The federal government furthermore endorsed the Seventh Circuit's conclusion in *Shots* "that a federal determination that a mechanism is an adequate warning device at a federally funded crossing improvement is a prerequisite for federal preemption." *Id.* 18.

3. This Petition Presents An Appropriate Vehicle To Resolve The Conflict In The Circuits

Certiorari should be granted in this case because this Petition squarely presents the conflict in the circuits over whether federal funding of railroad crossing devices is sufficient to pre-empt state law claims alleging that the devices are inadequate. If the Court concludes that pre-emption *per se* follows federal funding as a general matter, the Court then should resolve an important subsidiary question that is presented by this case and not *Shanklin*: whether a railroad nonetheless may be held liable if a subsequent determination has been made that the federally funded crossing devices are inadequate.

Furthermore, the nature of the warning devices at issue in this case and *Shanklin* may make this Petition a more appropriate vehicle to resolve the principal conflict in the circuits over federal pre-emption. At the time of the accident in this case, the Main Street crossing was protected by two reflectorized crossbucks. That minimum level of protection required by federal law parallels the facts of the vast majority of cases in which railroads assert pre-emption as a defense to

state law tort claims.[1] The Tennessee crossing program at issue in *Shanklin*, by contrast, involved the installation of devices that, according to the railroad, go "*far beyond* the federal MUTCD minimum of two reflectorized crossbucks, one on each approach to a crossing." Pet. for Cert., *Shanklin* 8 (emphasis added). Because the crossing in *Shanklin* was protected by more devices than required by federal regulations, a decision in that case could leave unresolved the scope of pre-emption for the majority of cases, which involve federal funding for only crossbucks.

There also appears to be some question whether, at the crossing at issue in *Shanklin*, the State installed the particular warning devices for which federal government provided funds. The Tennessee program "mandated there will be 'two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it.'" Pet. for Cert., *Shanklin* 8 (citation omitted). But according to the Petition, the state installed "three advanced warning signs" rather than two. *Id.* 9 & n.10. Nor is there any mention of the required "advanced pavement markings," although it is possible they already were in place at the crossing. If the State did not in fact install the devices for which the federal government provided funds, then it is quite possible the Court would refuse to find pre-emption in *Shanklin* without ever addressing the principal conflict in the circuits. In any event, the Petition in this case has the advantage of presenting a fully developed factual record

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[1] *E.g.*, *Bryan*, *supra*, 154 F.3d 899 (CA8 1998); *Ingram*, *supra*, 146 F.3d 858 (CA11 1998); *Steva* v. *Soo Line R.R. Co.*, No. 96-4198 NI, 1997 U.S. App. LEXIS 17373 (CA8 July 7, 1997); *Elrod*, *supra*, 68 F.3d 241 (CA8 1995); *Thiele*, *supra*, 68 F.3d 179 (CA7 1995); *Shots*, *supra*, 38 F.3d 304 (CA7 1994); *Shaup* v. *Fredrickson*, Civ. A. No. 97-7260, 1998 U.S. Dist. LEXIS 16524 (E.D. Penn. Oct. 16, 1998); *Stuckey* v. *Illinois Cent. R.R. Co.*, No. 2:96CV47-B-B, 1998 U.S. Dist. LEXIS 2648 (N.D. Miss. Feb. 2, 1998).

regarding the history of the warning devices at the Main Street crossing.

Finally, the *Shanklin* Respondent contends that a ruling by this Court may not affect the lower courts' judgment in that case. Specifically, the district court's judgment in *Shanklin* did not distinguish between the plaintiff's several theories of liability, only one of which relates to federal funding for crossing devices. If correct, this contention obviously would make *Shanklin* an inappropriate vehicle in which to address the pre-emption issue that has divided the circuits. Although Petitioner is not intimately familiar with the subtleties of the claims pleaded in *Shanklin*, Petitioner is lodging with the Court copies of the complaint, opinions of the district court, and judgment in that case, which suggest that the concern raised by the *Shanklin* Respondent is substantial.[2] In this

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[2] *See* Petr's Lodging, Tab 2, *Shanklin* Complaint ¶¶ 7a-7i (setting forth nine theories of liability, including "fail[ure] to sound the horn," operating "without keeping * * * a proper lookout ahead," "fail[ure] to properly and carefully train and instruct and supervise the crew," "fail[ure] to properly and carefully make policies to protect the traveling public," and "failure to provide a safe sight distance * * * by reducing the height of any embankment and or clearing the vegetation from the existing bank"); *id.* Tab 3, *Shanklin* District Court's Order Denying Plaintiff's Motion For Summary Judgment And Partially Granting And Partially Denying Defendant's Motion For Summary Judgment 12 (denying defendant's motion for summary judgment with respect to "Plaintiff's inadequate horn and braking, vegetation, and inadequate warning devices claims"), *reprinted at* Pet. for Cert., *Shanklin* 36-37a; *id.* Tab 4, *Shanklin* Jury Verdict (awarding judgment to plaintiff without any differentiation between claims); *id.* Tab 5, *Shanklin* District Court's Order Denying Defendant's Motion For Judgment Notwithstanding Verdict Or, In The Alternative, For A New Trial 4 (noting "extensive testimony by Plaintiff's experts that the limited sight distance at the crossing, because of vegetation, terrain, and the proximity of a house, in conjunction with the speed of both train and automobile, created a 'trap' making it impossible for Mr. Shanklin to see the train in time to avoid the collision"; also explaining that "Plaintiff's experts also testified that the headlamp of the train was inadequate because it shone straight down the track rather than at an angle that would provide warning" and that "[t]here was also

case, by contrast, Petitioner specifically amended his complaint to withdraw all claims that did not relate to the federal pre-emption issue on which the circuits have divided and the district court's judgment accordingly rests only on that issue. Pet. App. 13.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: September 27, 1999

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testimony that at night the headlamp could be confused with ordinary streetlights"); *id.* at 5 ("There was also evidence that a 'trap' was created by the limited sight distance at the crossing, in conjunction with the speeds of the trains and vehicles. This limited sight distance was the result of terrain, vegetation on the railroad's right of way, and the proximity of a nearby house.").

Elmer F. Bock, Administrator of the Estate of Phyllis Bock, Deceased, Appellant,

v.

St. Louis Southwestern Railway Company, Southern Pacific, Appellee.
Association of American Railroads, Amicus on Behalf of Appellee.

No. 97-4076

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

June 30, 1999, Filed

COUNSEL: Counsel who presented argument on behalf of the appellant was James B. McMath, Little Rock, AR. Additional attorney appearing on the brief was William M. Dabbis, Jr.

Counsel who presented argument on behalf of the appellee was Frederick S. Ursery, Little Rock, AR. Additional attorneys appearing on the brief were William H. Sutton and Clifford W. Plunkett.

JUDGES: Before LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

OPINION BY: HANSEN, Circuit Judge.

Elmer F. Bock, the administrator of the estate of Phyllis Bock, appeals from the district court's[1] grant of summary judgment in favor of the St. Louis Southwestern Railway in Bock's wrongful death action. We affirm.

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[1] The Honorable Henry L. Jones, Jr., United States Magistrate Judge for the Eastern District of Arkansas, hearing the case by consent of the parties pursuant to 28 U.S.C. § 636(c) (1994).

I.

The relevant facts, viewed in the light most favorable to Bock, are as follows. On March 10, 1992, Phyllis Bock was driving her car on Main Street in Roe, Arkansas. Main Street intersects railroad tracks owned by St. Louis Southwestern Railway Company (Southwestern). As Phyllis Bock crossed the tracks, a Southwestern train struck and killed her. At the time of the accident, crossbucks provided the sole protection at the Main Street crossing. Crossbucks are X-shaped signs that read "RAILROAD CROSSING" in reflectorized letters. The crossbucks were installed in 1980 as part of a statewide initiative to improve the safety of all railroad grade crossings. The United States Department of Transportation--Federal Highway Administration approved the expenditure of federal funds for use in the Main Street project.

In 1988 a diagnostic team organized by the Arkansas Highway Department inspected the Main Street crossing and recommended that the crossing be protected by lights and automatic gates. The federal government provided 90 percent of the cost, while Southwestern paid the City of Roe's 10 percent share. Southwestern received final authority to upgrade the crossing in September of 1991, and completed the project in March 1992, shortly after the accident that killed Phyllis Bock.

Elmer Bock, Phyllis Bock's father and the administrator of her estate, filed this wrongful death action in federal court on the basis of diversity of citizenship. Bock's original complaint included several theories of liability which are no longer relevant for the purposes of this appeal. Southwestern moved for summary judgment on the basis of federal preemption, and the district court granted the motion on May 12, 1997. On November 12, 1997, after Bock amended his complaint, the district court entered a final judgment dismissing Bock's case. This appeal followed.

II.

We review the district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to Bock, the nonmoving party. *Bryan* v. *Norfolk and Western Ry. Co.*, 154 F.3d 899, 901 (1998), *cert. dismissed*, 119 S. Ct. 921 (1999). We will affirm the district court's judgment only if there are no genuine issues of material fact and Southwestern is entitled to summary judgment as a matter of law. *Id.*; *see also Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56.

A. Abnormally Dangerous Crossing

Bock first argues that his wrongful death action is not preempted because the Main Street crossing was abnormally dangerous and Southwestern used inadequate warning devices to protect the crossing. The district court granted Southwestern's motion for summary judgment, holding that Bock's negligence claim was preempted by federal law.

The Supreme Court has held that when certain federal regulations issued by the Secretary of Transportation governing the protection devices to be placed at railroad grade crossings apply, *see* 23 C.F.R. § 646.214(b)(3)-(4) (1998), the federal regulations preempt state law tort claims pertaining to the maintenance of the railroad grade crossings. *See CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 670 (1993). Since *Easterwood*, our court has been quite clear that if federal funds have been expended for warning devices at a grade crossing, state law tort claims alleging negligence in the maintenance of the crossing are preempted. Consequently, the pivotal issue in this case is whether or not the cited regulations are applicable to the Main Street Crossing.

"Federal regulations are applicable if federal funds have been expended for the installation of the warning devices at the crossing. 'Federal funding is the touchstone of preemption in this area.'" *Bryan*, 154 F.3d at 903 (quoting *Elrod* v. *Burlington Northern R.R. Co.*, 68 F.3d 241, 244 (8th Cir.

1995)). There is no dispute in this record that federal funds were used to install the crossbucks at the Main Street crossing. Accordingly, Bock's claim should be preempted. Nonetheless, Bock argues that his claim is not preempted because the crossbucks were inadequate in view of 23 C.F.R. § 646.214(b)(3). Under that regulation, according to Bock, the characteristics of the Main Street crossing mandate the use of automatic gates with flashing light signals. *See* § 646.214(b)(3)(i)(B) (indicating that adequate warning devices are to include flashing lights and automatic gates when the crossing involves multiple tracks and the movement of an approaching train might be obscured). We recently addressed and rejected an identical legal argument. In *Bryan* the widow of a driver killed in a collision with a train argued that her wrongful death action was not preempted even though federally funded crossbucks protected the crossing in question. The widow asserted, as does Bock in this appeal, that under the regulations, the characteristics of the crossing warranted an automatic gate. *Bryan*, 154 F.3d at 903. Despite this argument, we held that "once federal funds have been expended towards grade crossing safety devices, and those devices are installed and operating, state law negligence claims are preempted by federal regulations." *Id.* at 904. Thus, it would appear that Bock's wrongful death action is preempted.

Factually, however, Bock's case differs from *Bryan* because prior to Phyllis Bock's accident, the relevant authorities made a determination to upgrade the Main Street crossing to a lights and gates configuration. According to Bock, this determination proves, as a matter of law, the inadequacy of the Main Street crossing, and consequently, suspends or terminates the preemption of state tort actions. We disagree.

Preemption is not a water spigot that is turned on and off simply because a later decision is made to upgrade a crossing. As we noted above, our cases clearly hold that once a

federally funded warning device is installed and operational--the crossbucks in this case--preemption occurs. *See Bryan,* 154 F.3d at 904; *Elrod,* 68 F.3d at 244; *St. Louis Southwestern Ry. Co.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994), *cert. denied*, 514 U.S. 1110 (1995). The fact that a better warning system is desirable is simply irrelevant. "The issue is not what warning system the federal government determines to be necessary, but whether the final authority to decide what warning system is needed has been taken out of the railroad's and the state's hands under 23 C.F.R. § 646.214(b)(3) & (4)." *Armijo* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996). We hold, therefore, that federal law preempts Bock's wrongful death claim based on the adequacy of the warning devices installed at the Main Street crossing.

B. Delayed Installation

Bock next argues that Southwestern negligently delayed the installation of the improved safety devices at the Main Street crossing. In other words, according to Bock, Southwestern is liable for failing to promptly install lights and gates after the determination to install such devices was made. Bock dedicates the majority of his brief on this topic to the question of whether such a cause of action exists under Arkansas law. We do not reach that question because we hold that Bock's negligent delay claim is also preempted by federal law.

Bock's argument is little more than an attempt to make an end run around the preemption doctrine. As we explained above, once preemption occurs, it is not suspended or terminated by a subsequent governmental determination regarding the adequacy of the crossing. When, as here, a plaintiff brings a state tort cause of action for harm sustained at a railroad crossing that has federally funded, installed, and operational warning devices, that state cause of action is preempted. That another, improved warning system was later planned is simply irrelevant. *See Armijo*, 87 F.3d at 1192

("The mere fact that the federal government has changed its opinion regarding what warning devices are needed at a particular crossing at some point after making a prior determination a lesser warning system is sufficient is of no real significance. . . ."). Whether Arkansas's common law recognizes a tort cause of action for negligent delay is likewise irrelevant because that cause of action would also be preempted. Due to preemption, the railroad was no longer duty-bound, in the tort sense, for causes of action based on the adequacy of the crossing safety devices. After the federally funded crossbucks were installed and operational, preemption absolved Southwestern of any state law obligation to upgrade the crossing sua sponte. *Cf. Malone*, 39 F.3d at 867 ("Before preemption, the public is protected by a railroad's state common-law duty of care. After installation of federally mandated warning devices, the public is protected by those devices."). Because Bock's negligent delay claim is founded on the premise that the then existing crossbucks inadequately protected the crossing, his claim is preempted. This case is markedly different from the situation presented in *Malone*. In that case, preemption had not occurred because the original federally funded warning devices were not yet installed at the crossing in question. *See id.* In this case they were.[2]

In sum, we hold that Bock's negligent delay claim is preempted.

III.

Accordingly, we affirm the district court's judgment.

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[2] The Main Street crossing upgrade was not an "accelerated" project under 23 C.F.R. § 646.218. If it were, that regulation would have allowed up to two years from and after the project authorization date (September 9, 1991) for completion of the project. *See* § 646.218(e). Even though it was not "accelerated," the Main Street crossing was completed within seven months after authorization by the Arkansas Highway Department.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

ELMER F. BOCK, Administrator
of the Estate of PHYLLIS BOCK,
Deceased

PLAINTIFF

vs. CASE NO. H-C-92-082

ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY - SOUTHERN PACIFIC

DEFENDANT

MEMORANDUM AND ORDER

Pending before the Court are the defendant's motion for partial summary judgment and the plaintiff's counter motion for partial summary judgment. Phyllis Bock was killed on March 10, 1992, at the Main Street Crossing in Roe, Arkansas, when she collided with a railway freight train. Elmer F. Bock, the administrator of his daughter's estate, filed suit alleging negligence on the part of the defendant.

Four of plaintiff's claims are that (1) the crossing was abnormally dangerous; (2) the railway negligently delayed adding gates and flashers to the warning devices at the crossing; (3) the railway operated its train at an excessive rate of speed; and (4) the locomotive's horn was inadequate. Defendant contends these claims conflict with the federal law of railroads and railroad crossings and are preempted by federal law. The plaintiff contends that as a matter of law the crossing was inadequately protected at the time of the collision. The plaintiff has conceded that the defendant's horn complied with federal standards which are preemptive.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if "a reasonable jury could return a verdict in favor of either party." *White* v. *Farrier*, 849 F.2d 322, 325 (8th Cir. 1988).

> By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

Anderson v. *Liberty Lobby*, 477 U.S. 242, 247-48 (1986). Although the moving party has the burden of showing the absence of a genuine issue of material fact, the nonmoving party has the burden of producing "evidence that would support a jury verdict." *Id.*, at 256.

The nonmovant has an affirmative burden "to go beyond the pleadings" and "by affidavit or otherwise" designate "specific facts showing that there is a genuine issue for trial." *Commercial Union Insurance Co.* v. *Schmidt*, 967 F.2d 270, 271 (8th Cir. 1992) (citations omitted).

> Summary judgment is not to be construed as a "disfavored procedural short-cut" but should be interpreted to accomplish its purpose of isolating and disposing of factually unsupported claims and defenses. Yet the Supreme Court also notes that trial courts should act with great caution and may deny summary judgment when it believes "the better course is to proceed to a full trial."

Id., at 272.

The substantive law of the case will identify which facts are material or if a reasonable jury could return a verdict in favor of either party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 248.

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial .... [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id., at 249. The evidence is to be viewed in the light most favorable to the nonmoving party and the court must give the nonmoving party the benefit of all inferences which reasonably may be drawn. *Hagerman* v. *Yukon Energy Corp.*, 839 F.2d 407, 409 (8th Cir.), *cert. denied*, 109 S.Ct. 63 (1988).

I. Abnormally Dangerous Crossing

The parties agree that at the time of the accident the crossing was guarded by crossbucks with "RAILROAD CROSSING" spelled out in reflectorized letters. The crossbuck installation with federal financing was made in conjunction with the installation of crossbucks on all public crossings involving four railroads within the state of Arkansas. The purpose was to upgrade all public crossings to new standard requirements set forth in the Manual on Uniform Traffic Control Devices (MUTCD).

In *Elrod* v. *Burlington Northern R.R. Co.*, 68 F.3d 241, 243-44 (8th Cir. 1995), the court sets forth its reasoning in this area.

> In *Easterwood*, the Supreme Court held that federal grade crossing regulations would preempt state-law tort claims if federal funds were used to install the warning devices at the crossing where the accident occurred. In that case, a widow brought a wrongful death action against CSX Transportation after her husband was killed when his truck collided with a CSX train at a grade

crossing in Georgia. Easterwood alleged, *inter alia*, that CSX was negligent under Georgia law for failing to install adequate warning devices at the crossing. CSX "argued that this state-law claim had been preempted by federal grade crossing regulations and corresponding enabling legislation. *Easterwood*, __ U.S. at __, 113 S.Ct. at 1736.

The *Easterwood* Court explained that federal grade crossing regulations may preempt a railroad's state-law duties when the regulations "cover" the same subject matter as a plaintiff's state-law claim. *Id.* at ___ __ ___, 113 S.Ct. at 1737-38. After rejecting other potential sources of preemption, the Court examined the federal grade crossing regulations in 23 C.F.R. § 646.214 (b) (3) and (4), and found that they covered the same subject matter as inadequate warning device claims under state law. The Court therefore held that when these regulations apply, "state tort law is pre-empted." *Id.* at _____ __ ____, 113 S.Ct. at 1740-41. The federal grade crossing regulations did not apply to the facts in *Easterwood*, however, because federal funds were not used to install the warning devices at the crossing where the accident occurred. *Easterwood's* warning device claim was therefore not preempted. Federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators. *See, e.g., Hester* v. *CSX Transp., Inc.*, 61 F.3d 382, 387 (5th Cir. 1995) ("The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task.").

When *Easterwood* and *Elrod* are read with *Cartwright* v. *Burlington Northern R.R. Co.*, 908 F. Supp. 662 (E.D. Ark.

1995) the plaintiff's arguments, as incisive as they are, must fail. Plaintiff's negligence claim based on inadequate warnings for this "abnormally dangerous crossing" is preempted and summary judgment for the defendant is granted on this claim.

II. Delayed Installation

The parties have found no Arkansas case recognizing a claim against a railroad for the delayed installation of crossing warning devices. However, if Arkansas were to recognize such a claim, it would be preempted by federal law. Given the ruling that the claim based on inadequate warnings is preempted, I find that preemption does not end because of a decision to upgrade the devices previously approved by the Secretary. The reasoning of the Tenth Circuit in *Armijo* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996) is persuasive.

> [T]he issue is not what warning system the federal government determines to be necessary, but whether the *final authority to decide* what warning system is needed has been taken out of the railroad's and the state's hands under 23 C.F.R. § 646.214(b)(3) & (4). The only situation we can envision in which preemption could arguably be considered suspended or terminated would be where the Secretary of Transportation does not merely change his or her view regarding the type of warning system needed, but affirmatively abandons the project and either withdraws federal funding or allows previously allocated funding to be used at another site, which did not occur in this case.

This claim is also preempted and summary judgment for the defendant is granted.

III. Excessive Speed

The parties agree that defendant's train was traveling within the applicable federal speed limit at the time of the

accident and that under the Federal Railroad Safety Act, federal regulations adopted by the Secretary of Transportation ordinarily preempt such a claim. *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Plaintiff argues that the issue is not preempted, however, because of the existence of a specific, individual hazard as recognized in *Easterwood*. On the record at this time genuine issues of material fact remain as to whether a specific, individual hazard existed at the time of the accident. The defendant's motion for summary judgment on this claim is denied.

Given the Court's rulings in this memorandum and order, defendant's motion to strike (DE #52) is moot and the Clerk shall remove same from the pending motions report. In addition, because many of the issues raised in defendant's motion in limine (DE #22) are moot and some can only be resolved during the trial of this case, the motion is denied at this time. Defendant or plaintiff may raise any of the issues necessary before trial in supplemental pleadings.

IT IS, THEREFORE, ORDERED that plaintiff's motion for partial summary judgment be, and it is hereby, denied, and defendant's motion for partial summary judgment be, and it is hereby, granted in part and denied in part.

SO ORDERED this 9th day of May, 1997.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

ELMER F. BOCK, Administrator
of the Estate of PHYLLIS BOCK,
Deceased

PLAINTIFF

vs. CASE NO. H-C-92-082

ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY SOUTHERN PACIFIC

DEFENDANT

ORDER

Plaintiff's amended complaint filed on this date contains only claims previously dismissed by this Court in the Memorandum and order filed on May 12, 1997 (DE 055). Therefore, this case must be dismissed.

IT IS, THEREFORE, ORDERED that this case be, and it is hereby, dismissed.

SO ORDERED this 12th day of November, 1997.

UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

ELMER F. BOCK, Administrator
of the Estate of PHYLLIS BOCK,
Deceased

PLAINTIFF

vs. CASE NO. H-C-92-082

ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY - SOUTHERN PACIFIC

DEFENDANT

JUDGMENT

Pursuant to the Order entered in this case on this date, IT IS CONSIDERED, ORDERED and ADJUDGED that this case be dismissed. The relief sought is denied.

IT IS SO ADJUDGED on this 12th day of November, 1997.

UNITED STATES MAGISTRATE JUDGE

49 USCS § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order--

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

23 CFR § 646.214. Design.

(a) General.

(1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) Grade crossing improvements.

(1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or

locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) Grade crossing elimination. All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

FILED
NOV 15
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-538

IN THE

Supreme Court of the United States

ELMER F. BOCK, Administrator of the
Estate of Phyllis Bock, Deceased,

Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

All the parties to the proceedings are listed in the caption.

St. Louis Southwestern Railway Company is a wholly-owned subsidiary of Union Pacific Corporation, a publicly-held corporation.

STATEMENT OF THE CASE

The petitioner seeks this Court's review of the circumstances in which federal funding for railroad crossing warning devices preempts state common-law claims alleging the inadequacy of those devices. This Court recently granted a petition for *certiorari* for this same issue in *Norfolk Southern Railway Co. v. Shanklin* (filed Aug. 20, 1999, and brief in opposition filed September 17, 1999). In this case, the Eighth Circuit applied the established law of the circuit in relation to federal preemption of inadequate warning device claims, finding that "once a federally funded warning device is installed and operational . . . preemption occurs." Pet. App. 4-5. Thus, petitioner's state-law claims were preempted based on the clear record in the case. In *Shanklin*, however, the Sixth Circuit held that preemption applies only if the federal government both funds the warning devices and makes an actual determination that the devices at the specific crossing are adequate. (Pet. for Cert., *Shanklin* 13a). Since this Court's decision in *Shanklin* should resolve the issues in this case, the Court should stay the present matter until after *Shanklin* is decided.

THIS CASE SHOULD BE HELD IN ABEYANCE UNTIL AFTER THIS COURT'S DECISION IN *SHANKLIN*

There is no dispute that Petitioner's claims would not have been preempted if the Sixth Circuit's holding in *Shanklin* applied in this case. It is also clear that if this Court finds that federal funding is sufficient to preempt common-law claims, and reverses *Shanklin*, the Eighth Circuit's ruling in the present case is correct and should stand. Also, if this Court affirms *Shanklin* by finding that preemption requires

more than federal funding of warning devices at a crossing, then the present case should be reversed. Accordingly, since this Court's decision in *Shanklin* should resolve the issues in the present matter, the Court should stay this matter until after its decision in *Shanklin*.

Holding this case in abeyance until after the Court decides *Shanklin* will promote judicial economy by saving time, effort, and resources for the parties involved and the Court. After *Shanklin* is decided, the Court can determine whether *certiorari* is appropriate in this case based on its preemption ruling. If necessary, the parties can file additional pleadings addressing the effect the ruling in *Shanklin* has on this case after that case is decided. This procedure should reduce the amount of material the Court will have to review to decide the preemption issue and assist in a timely resolution for all parties.

CONCLUSION

For the foregoing reasons, this Court should stay this matter until after *Shanklin* is decided.

Respectfully submitted,

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